

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: MAY 5 1989
CASE NO. 88-INA-24

IN THE MATTER OF

BELHA CORPORATION (FOUR CORNER IMPORTERS)
Employer

on behalf of

SUNDEEP ANAND
Alien

Howard M. Rosengarten, Esq.
New York, N.Y.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, Tureck, and
Williams,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by Belha Corporation (Four Corner Importers) ("Employer") on behalf of Sundeep Anand ("Alien") pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) ("the Act"). Employer requested review from U.S. Department of Labor Certifying Officer ("CO") Betty F. Roy's denial of a labor certification application pursuant to 20 C.F.R. § 656.26 (1988).¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will

¹ All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (A 1-64), and Employer's brief. See § 656.27(c).

Statement of the Case

Employer is an import-export company located in Flemington, New Jersey whose business is buying and distributing U.S. and Indian films, audio tapes and discs. On February 21, 1986, Employer's application for alien labor certification was accepted for processing (A 12). Employer stated that it was recruiting for the position of buyer and distributor of films, audio tapes and discs. Employer listed the duties of the position as buyer and distributor of U.S. & Indian films, audio tapes and discs that will be distributed by the Belha Corporation. Employer stated that the duties will require knowledge of the Punjabi, Marthi, and Hindi languages and knowledge of the film industry in India. Also, Employer stated at Item #14 on its application form that the minimum "education, training, and experience" necessary for a worker to satisfactorily perform these job duties is two years of experience in the job offered (A 8).

On July 22, 1987, the CO issued a Notice of Findings ("NOF") (A 26-28). She determined, inter alia, that the job opportunity contains a foreign languages requirement that has not been supported by evidence of business necessity as required by § 656.21(b)(2). The CO stated that Employer has not shown the following: the percentage of the people Employer deals with who cannot communicate in English; the percentage of Employer's business that is dependent upon the language; how absence of the language requirement would impact Employer's business; and the percentage of time which the employee would use the language. Employer was instructed either to delete the languages requirement or document that it arises from business necessity.

On August 10, 1987, Employer submitted its rebuttal to the NOF (A 31-32). The only reference to the necessity of the foreign languages requirement was Employer's statement that "They (the tapes and discs) are often only in Hindi, or Urdu . . . " (A 32).

On August 19, 1987, the CO issued a Final Determination denying labor certification based on Employer's failure to meet the requirements of § 656 (A 36-37).

On September 2, 1987, Employer submitted a request for review (A 62-64).²

Discussion and Conclusions

Although in the Final Determination the CO preliminarily stated that Employer had documented that his requirements for the job are the minimum realistic requirements, she later pointed out that Employer failed to document the business necessity for the three Indian dialects. It is clear from a complete reading of the Final Determination that the CO found that the job opportunity contains a foreign language requirement which has not been supported by evidence of business necessity, as required by § 656.21(b)(2).³ The CO noted that the NOF clearly asked Employer to document the business necessity for the foreign languages requirement.

The CO has properly treated Employer's requirement of knowledge of foreign languages as presumptively unduly restrictive; thus, Employer must document that the requirement arises from business necessity. § 656.21(b)(2)(i)(C).

In its application for labor certification, Employer stated that it was requiring knowledge of the Punjabi, Marthi and Hindi languages. In its rebuttal, as evidence that the foreign languages requirement arises from business necessity, Employer made the general statement that some of the products with which it deals are available only in Hindi or Urdu. This statement is a facially insufficient explanation since it fails even to address the requirement of knowledge of the Punjabi and Marthi languages.

Since Employer failed to meet its burden of proof by producing documentation of a business necessity for all of the foreign languages it required, this alien labor certification was correctly denied by the CO.

² Employer's request for review was accompanied by a statement written by the President/Treasurer and supporting documents (A 38-61). This evidence was not a part of the record upon which the denial of certification was based; therefore, it cannot be considered by the Board. See §§ 656.26(b)(4), 656.27(c); In re University of Texas at San Antonio, 88-INA-71 (May 9, 1988).

³ Since this potentially misleading statement appeared in the Final Determination, it could not have affected Employer's submission of evidence; Employer's opportunity for rebuttal had already elapsed.

ORDER

The Final Determination of the CO denying labor certification is **AFFIRMED**.

JEFFREY TURECK
Administrative Law Judge